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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/689,277	10/20/2003	Eddie F. Ray III	MSDI-269/PC545.02	2922
52196 7590 01/23/2009 KRIEG DEVAULT LLP ONE INDIANA SQUARE, SUITE 2800 INDIANAPOLIS, IN 46204-2709				
EXAMINER CUMBERLEDGE, JERRY L				
ART UNIT 3733		PAPER NUMBER		
MAIL DATE 01/23/2009		DELIVERY MODE PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/689,277

**Applicant(s)**

RAY ET AL.

**Examiner**

JERRY CUMBERLEDGE

**Art Unit**

3733

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 15 September 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-6, 8-19, 27-32 and 34-38 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 9, 14, 16, 19, 27-30, 36 and 38 is/are rejected.
- 7) ☒ Claim(s) 5, 6, 8, 10-13, 15, 17, 18, 31, 32, 34, 35 and 37 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Final Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Response to Arguments***

Applicant's arguments, see Pre-appeal Brief Request, page 4, filed 09/15/2008, have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Wall et al. (US Pat. 5,048,971).

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4, 9, 14, 16, 19, 27-30, 36 and 38 are rejected under 35 U.S.C. 102(b) as being anticipated by Wall et al. (US Pat. 5,048,971).

Wall discloses a spinal instrument assembly, comprising: a guide sleeve housing (Fig. 1, ref. 2) including a proximal portion and a distal portion (Fig. 1), said proximal portion including an inner wall defining a proximal chamber (Fig. 1), said housing further including a first working channel port (Fig. 1, ref. 3) and a second working channel port (Fig. 1, ref. 4) extending through said distal portion and extending distally from and forming an extension of said proximal chamber (Fig. 1), wherein said first and second working channel ports are in communication with one another through said distal portion to together form an oval shaped working channel port through said distal portion (Fig.

1); and a central distractor (Fig. 1, ref. 11) in said chamber of said guide sleeve housing, said central distractor including a distractor tip movably positionable from a location between said first and second working channel ports (Fig. 1, near ref. numeral 20a), said distractor tip including upper and lower distraction surfaces (Fig. 1, upper and lower surfaces) defining a distraction height therebetween to maintain distraction of a spinal disc space (Fig. 1). The proximal chamber is sized to receive a distal end of a guide sleeve (Fig. 1). The tip of said central distractor is centrally located in said housing (Fig. 1). The central distractor is rotatable from a reduced height configuration whereby said upper and lower distraction surfaces are oriented away from vertebral endplates of a spinal disc space to a distraction configuration whereby said upper and lower distraction surfaces are oriented toward vertebral endplates of the spinal disc space (Fig. 1, e.g. ref. 10 and ref. 11). The proximal portion of said guide sleeve housing defines a groove formed in said inner wall that defines said proximal chamber (Fig. 1, internal groove of ref. 2). The guide sleeve housing is removably engageable to a housing inserter (Fig. 1). The central distractor is withdrawable from said guide sleeve housing (Fig. 1)(Fig. 4a-7b). The instrument assembly further comprises a guide sleeve engageable to said proximal portion of said guide sleeve housing (Fig. 1, ref. 14). The first working channel port and said second working channel port of said guide sleeve housing are in communication with one another through said guide sleeve housing (Fig. 1). When in an operative position said proximal portion of said guide sleeve housing includes a first width (Fig. 1) transverse to the spinal column axis and said distal portion includes a second width (Fig. 1) transverse to the spinal column axis, said first width being greater

than said second width and said central distractor extends distally from said distal portion (Fig. 1).

Wall discloses a spinal surgical instrument, comprising: a shaft (Fig. 1, ref. 11, proximal portion); an engaging portion at a distal end of said shaft (Fig. 1, middle portion of ref. 11); and a distractor tip extending distally of said engaging portion (Fig. 1, distal portion of ref. 11), wherein said engaging portion has an enlarged configuration (Fig. 1) and extends outwardly from each of said shaft and said distractor tip (Fig. 1)(Fig. 4a-7b), said enlarged configuration being sized and shaped to fit in said proximal chamber with a close interfit to provide a rigid assembly between said engaging portion and said guide sleeve housing (Fig. 1). The distractor tip is rotatable relative to said engaging portion between a distraction configuration and a reduced height configuration (Fig. 1, ref. 10 and ref. 11). The distractor tip includes an upper distracting surface and an opposite lower distracting surface (Fig. 1, top and bottom surfaces of ref. 11)). At least one of said upper and lower distracting surfaces includes a vertebral endplate engaging surface (Fig. 1).

Wall discloses a spinal instrument assembly, comprising: a guide sleeve housing (Fig. 1, ref. 1) including a proximal portion and a distal portion (Fig. 1), said proximal portion including an inner wall defining a proximal chamber (Fig. 1), said housing further including a first working channel port (Fig. 1, ref. 3) and a second working channel port (Fig. 1, ref. 4) extending through said distal portion in communication with one another (Fig. 1) and in communication with said proximal chamber (Fig. 1), wherein said guide sleeve housing does not include a medial wall in said proximal chamber between first

and second working channel ports (Fig. 1); and a central distractor (Fig. 1, ref. 11) in said chamber of said guide sleeve housing (Fig. 1), said central distractor including a distractor tip at a location between said first and second working channel ports (Fig. 1, distal portion of ref. 11), said distractor tip including upper and lower distraction surfaces defining a distraction height therebetween to maintain distraction of a spinal disc space (Fig. 1, top and bottom surfaces of ref. 11). The central distractor is removable from said guide sleeve housing (Fig. 1)(Fig. 4a-7b).

#### ***Allowable Subject Matter***

Claims 5, 6, 8, 10-13, 15, 17, 18, 31, 32, 34, 35 and 37 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Please see attached PTO-892.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JERRY CUMBERLEDGE whose telephone number is (571)272-2289. The examiner can normally be reached on Monday - Friday, 8:30 AM - 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/J. C./  
Examiner, Art Unit 3733  
/Eduardo C. Robert/  
Supervisory Patent Examiner, Art Unit 3733